deterred cable operators from offering new services, and therefore applied the cable rate to cable operators' attachments used for both video and Internet services.[542] The Commission recognized that there were strong policy reasons for this approach, concluding it "will encourage greater competition in the provision of Internet service and greater benefits to consumers."[543] Indeed, cable operators described the significant negative effect that raising cable pole attachment rates to the telecom rate would have on broadband investment in rural areas given the already higher costs to serve those areas.[544] For poles subject to Commission-regulated rates used by the cable industry, NCTA noted a $3 difference between the cable rate and the present telecom rate could amount to approximately $90 million to $120 million per year, which could ultimately affect subscribers and future infrastructure investment, including broadband deployment.[545]

176. The Commission's policy has provided pole owners with a compensatory rate and successfully spurred investment by cable operators in networks capable of delivering advanced communications services and the growth of facilities-based competition, both to the benefit of consumers.[546] For example, the American Cable Association explains that low attachment rates have been "instrumental in the ability of smaller cable operators to deploy broadband facilities and offer advanced communications services."[547] Moreover, we agree with commenters that extending this policy by implementing a low and more uniform rate that will be applicable to attachments used by telecommunications carriers will eliminate competitive disadvantages that carriers like TWTC face by having to pay higher rates for these key inputs to communications services.[548] At the same time, based on the views of consumer advocates discussed above,[549] we believe that our new telecom rate appropriately acknowledges the policy interests in utility pole investment and of utility ratepayers.

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[542] *1998 Implementation Order*, 13 FCC Rcd at 6794, para. 32. In 2000, the Supreme Court upheld this decision, finding that section 224(b) gives the Commission authority to adopt just and reasonable rates for attachments within the general scope of section 224 of the Act, but outside the "self-described scope" of the telecom rate formula or cable rate formula as specified under sections 224(d) and (e). *Gulf Power*, 534 U.S. at 335–36, 338–39.

[543] *1998 Implementation Order*, 13 FCC Rcd at 6794, para. 32.

[544] *See, e.g.*, Charter *NPRM* Comments at 3–6 (stating that monthly Internet rates would increase by $2.47–$4.33 per customer) ("[T]he presence of one Internet customer would 'contaminate' the entire system and thus all pole attachments with a higher rate . . . . In the areas that Charter serves with 10–15 subscribers per mile, the impact . . . would be devastating given the already higher costs in rural areas. . . . The increases will be so significant and the cost pressure so intense that many competitors will forego providing service in rural areas as the domino effect on projected take rates by rural customers will further reduce such providers' expectation of a return on investment that would outpace capital debt reimbursement obligations.").

[545] *Further Notice*, 25 FCC Rcd at 11912, para. 116 (citing NCTA Comments, Pelcovits Decl. at para. 13 (filed Sept. 24, 2009) (based on the estimated 30–40 million poles with cable attachments subject to Commission regulation)). Cable commenters estimate an even greater difference between the two rates of $208 million to $672 million annually for the cable industry as a whole. NCTA Comments, Pelcovits Decl. at para. 22. Likewise, in the case of just one state—West Virginia—a difference of approximately $4 million in pole attachment expenses per year between the current cable and telecom rates was estimated. NCTA Comments, Attach. Gregg Decl. at para. 14 & tbl. 2.

[546] NCTA Comments at 1.

[547] *See, e.g.*, ACA Comments at 3.

[548] TWTC explains that it "provides broadband information and telecommunications services over fiber that it deploys" and "[a]ccess to poles is usually the most efficient and often the only means of deploying these fiber transmission facilities." TWTC White Paper, RM-1293, at 2.

[549] *See supra* Part V.B.1.

177. Furthermore, we find informative the actions taken by state regulators that have elected to exercise jurisdiction over pole attachments in lieu of the Commission.[550] Commenters report that many of these states apply a uniform rate for all attachments used to provide cable and telecommunications services, and have done so by establishing a rate identical or similar to the Commission's cable rate formula.[551]

178. We are not persuaded by utilities' arguments that question the impact of the new telecom rate on broadband deployment.[552] Utilities assert that broadband already is available to the vast majority of the U.S. population, and that factors other than the costs of pole attachments are more important to decisions to deploy in rural areas.[553] These arguments, however, overlook the documented reluctance on the part of cable providers to expand their networks and provide new high-capacity services to customers such as anchor institutions or wireless providers – whether in urban or rural areas – because of the risk that some of those services could potentially be classified as "telecommunications services," triggering disputes as to whether the higher, telecom rate should be applied over their entire pole attachment network. As discussed above, the record indicates this problem is a barrier to the deployment of integrated voice, data, and video services, including the provision of broadband services to anchor institutions.[554] By minimizing this disparity, the Commission will promote competition that will lead to more and better service offerings at lower prices.

179. Even beyond the effects of the rate disparity, we anticipate that the absolute level of pole rental rates also is likely to be relevant to decisions regarding what services are provided. In addition to the comments in the current record,[555] the National Broadband Plan cited cost information suggesting that higher pole attachment costs can affect broadband deployment.[556] Reducing input costs improves the business case for broadband deployment at the margin, expanding opportunities for investment. The effect of a reduction in one type of input cost becomes even more significant as the Commission

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[550] These states, listed in Appendix C, certify that they meet certain statutory requirements. 47 U.S.C. § 224(c)(2)(B), (c)(3)(B) (the state regulatory commission must "consider the interests of the subscribers of the services offered via such attachments as well as the interests of the consumers of the utility services," and it must provide prompt action on complaints).

[551] Comcast Comments at 18–20; NCTA Comments at Attach. B; TWC Comments at 3; Verizon Reply at 10–11 (stating that "[f]or example, in New York 'there is one pole attachment rate, which applies to all attachments regardless of the type of company' and that rate is 'based on the federal formula for cable television attachments'"). *But see* Coalition *NPRM* Comments at 36 (citing to three states and one city that adopted higher attachment rates).

[552] *See, e.g.*, EEI/UTC Orszag, Shampine Decl. at 13–15 (arguing that most of the poles in areas without broadband would not be affected by the Commission's proposed rate and this rate is a relatively small fraction of network costs).

[553] *See, e.g.*, APPA Reply at 19; Coalition Comments at 120; NRECA Comments at 27 (arguing low pole rates are not enough to promote broadband deployment and that there are not enough consumers that can generate sufficient revenue for broadband service providers to deploy in very low density areas).

[554] We note that, under existing Commission precedent, cable operators that provide commingled Internet access services do not trigger the higher telecom rate on that basis, and our actions here do not alter that holding. *See supra* note 464.

[555] Letter from Craig A. Gilley, Counsel for Suddenlink Comm. and Mediacom Comm. Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 1 (Feb. 10, 2011).

[556] *See, e.g.*, NATIONAL BROADBAND PLAN at 110 n.7 (citing to NCTA *NPRM* Comments App. B, Decl. of Dr. Michael D. Pelcovits). That study found that an increase in the cable rate to the telecom rate for cable companies would translate to a cost increase ranging between $10.46 and $33.75 annually per broadband subscriber, and such an "increase in pole attachment rates is likely to make it unprofitable for cable companies to enter new markets or continue to offer broadband service in some rural areas." NCTA *NPRM* Comments App. B, Decl. of Dr. Michael D. Pelcovits at 21.

undertakes additional steps to accelerate broadband deployment. Scarce resources and the fact that up to 24 million Americans do not have access to broadband today lend greater urgency to the Commission's efforts to ensure that policies regarding key inputs that bear on broadband deployment and availability are designed to facilitate utilization of those resources to promote broadband.[557]

180. In arguing to revise the present telecom rate upward and make it the uniform rate for attachments, electric utilities assert that the telecom rate is based on "unrealistic presumptions" for the average number of attaching entities on a pole and the classification of "safety space" as "usable space."[558] The Commission has given extensive consideration to these issues in prior decisions, and we find no basis for revisiting them.[559] Indeed, as we noted above, we find instructive consumer advocates' position supporting the cable rate as the just and reasonable rate for all pole attachments and stating that increasing attachment rates for broadband services would be "contrary to 'the nation's commitment to achieving universal broadband deployment and adoption.'"[560]

181. In sum, we conclude that there are substantial benefits that will be derived from adoption of the revised telecom rate, and that these benefits substantially outweigh any costs associated with the rule. Although it is not possible to quantify with precision the benefits and costs based on the information we have before us, and although some of the benefits are not subject to quantification, several sources of gain stand out. For one, largely eliminating the difference in prices charged to cable operators and telecommunications carriers will significantly reduce the extent to which investment and deployment choices by such providers, and competition more generally, are distorted based on regulatory classifications.[561] Reducing the telecom rate to make it closer to uniform with the cable rate will enable more efficient investment decisions in network expansion and upgrades, most notably in the deployment of modern broadband networks.[562] In addition, the change reduces the uncertainty facing third party attachers, and in particular cable companies, as to what charges they are likely to face when they engage

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[557] *Sixth Broadband Deployment Report*, 25 FCC Rcd at 9574, para. 28 ("[A]pproximately 14 to 24 million Americans do not have access to broadband today. [This] group appears to be disproportionately lower-income Americans and Americans who live in rural areas. The goal of the statute, and the standard against which we measure our progress, is universal broadband availability.").

[558] *See, e.g.*, EEI/UTC Comments at 75; Florida IOUs Reply at 46 (contending that safety space (usually 40 inches) on a pole, currently included as "usable space" in the rate formula, is only necessary because of communications attachers and should be treated as "unusable" space so that electric utilities are not bearing the full cost of providing the space); Florida IOUs Reply at 68–69.

[559] *2001 Order on Reconsideration*, 16 FCC Rcd at 12130, para. 51 (rejecting utility arguments to remove the 40-inch safety space from the presumptive 13.5 feet of usable space and affirming the *2000 Fee Order*, 15 FCC Rcd at 6467–68, para. 22 (finding that "the presence of the potentially hazardous electric lines . . . makes the safety space necessary and but for the presence of those lines, the space could be used by cable and telecommunications attachers," and further that this "space is usable and is used by the electric utilities")). *See supra* note 517 in response to utility assertions about the presumptive number of attachers. We also decline to adopt the USTelecom and AT&T/Verizon proposals for pole attachment rates. *See Further Notice*, 25 FCC Rcd at 11913–14, para. 119 (describing those proposals). Even beyond the questions about whether those proposals are consistent with section 224, *id.* at 11914, para. 120, we are not persuaded that it will advance our broadband policies to increase the input costs for some providers, as both proposals would do. *Id.* at 11914–15, para. 121.

[560] NASUCA Reply at 5.

[561] As discussed above, this will directly lead to better resource allocation on an ongoing basis, *see supra* paras. 174–176, the benefits of which will be large when summed across the nation and over time.

[562] *See supra* paras. 174–176. In addition, pole attachments are commonly an essential input, and hence critical to the competitive process. *See, e.g., supra* paras. 172, 179. The cumulative efficiency benefit of improved competition across the nation and over time can be expected to be significant.

in the provision of new advanced services or network upgrades.[563] The new telecom rate also will substantially reduce the incentives for costly disputes by substantially reducing the potential gains that a party can claim by arguing for a favorable attachment definition.[564] At the same time, in defining the new telecom rate we have been mindful of the potential burden of reform on utility ratepayers and the incentives of utilities to continue investing in pole infrastructure, and have accounted for that in setting the new telecom rate.[565]

4. The Commission's Approach Permits Utilities to Recover Their Costs

182. We are not persuaded by claims of utilities that the new telecom rate will not enable them to recover their costs. The new telecom rate is compensatory and is designed so that utilities will not be cross-subsidizing attachers, as it ensures that utilities will recover more than the incremental cost of making attachments. The record provides no evidence indicating that there is any category or type of costs that are caused by the attacher that are not recovered through the new telecom rate.

183. *New Telecom Rate Is Compensatory.* Under our new approach, the lower-bound telecom rate excludes capital costs – the depreciation, rate of return, and tax components of the carrying charges[566] – consistent with economic, cost causation principles. Pole owners would continue to recover up-front, through make-ready fees, the entire amount of the capital costs incurred to accommodate an attacher. As Comcast points out, this approach is also consistent with Congress's understanding that pole attachments generally do not impose any capital costs on utilities that are not recovered fully in make-ready charges: "Thus, the only added cost to the utility resulting from the pole attachment would be administrative costs."[567] Significantly, the lower-bound telecommunications rate, the new telecom rate, and the cable rate each are fully compensatory to utilities because these rates meet or exceed incremental cost, and satisfy all constitutional compensation requirements.[568] The cable rate formula has been upheld by the courts as just, reasonable, and fully compensatory, and in virtually all cases the new telecom rate will recover at least an equivalent amount of costs.[569] Further, if the lower-bound telecom rate is applied, it will be because it is *higher* than the (already compensatory) rate yielded by the cable rate formula.

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[563] Attachments to a particular utility pole by cable operators and telecommunications carriers are a near identical input, so any price difference directly treats competitors differently.

[564] Thus, under the new telecom rate, fewer resources can be profitably wasted in such disputes. *See supra* para. 174 (discussing how a low and more uniform rate will reduce disputes and litigation about the applicability of "cable" or "telecommunications" rates). The efficiency gains due to reduced rent seeking are likely to be significant because they are of a first-order magnitude (that is, they apply to every attachment sold), rather than applying to marginal changes in attachments made.

[565] *See supra* paras. 146–152.

[566] *See supra* note 419.

[567] Comcast Comments at 13 (citing 123 Cong. Rec. 5080 (1977) (statement of Rep. Wirth) and 1977 Senate Report at 19 ("[A utility's] avoidable costs...could be expected to be minimal since most of those costs are the outlays that should be fully recovered in the make-ready charges.").

[568] The new telecom rate would be equal to the higher of either the lower-end telecom rate or the cable rate; generally this will result in the cable rate.

[569] *See, e.g., Alabama Power Co. v. FCC*, 311 F.3d at 1370–71 ("[A]ny implementation of the [Commission's cable pole attachment rate] (which provides for much more than marginal cost) necessarily provides just compensation."); *FCC v. Florida Power Corp.*, 480 U.S. at 253–54 (finding that it could not "seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory"). *See also* NATIONAL BROADBAND PLAN at 110 ("[The cable rate] has been in place for 31 years and is 'just and reasonable' and fully compensatory to utilities."); Comcast *NPRM* Comments Exh. 2, Decl. of Harold W. Furchtgott-Roth at 1, 10–11 (Furchtgott-Roth Report); Comcast Kravtin Report at paras. 38–40, 67–72).

184. *No Evidence of Utility Subsidy.* We find no evidence in the record that supports the utilities' assertions that the lower-bound telecom formula results in rates so low that it forces electric ratepayers to subsidize third-party attachment rates.[570] Under economic and legal principles, a given service is not subsidized by other services if the rate for the service produces revenues that cover all of the costs caused by the service.[571] In this case, neither the firm that provides the given service and other services, nor the customers of those other services, are made worse off by the firm incurring costs to supply the service. The given service (*e.g.,* access to poles) does not subsidize other services (*e.g.,* electric service) if its rate produces revenues that cover the incremental costs of providing the service.

185. *Capital Costs.* We next discuss the specific costs – capital, maintenance, and administrative costs -- caused by third-party attachers, and why the amount of each particular cost reflected in the lower-bound rate is not a subsidized amount. The capital costs of a pole are for the physical material of the pole itself and for the labor and engineering needed to install it. The attacher causes the pole owner to incur costs if measures such as rearrangement or bracketing are performed, or if there is no space available on an existing pole to accommodate an attachment. The attacher causes the pole owner to incur the costs for rearranging existing attachments, adding brackets, installing a new pole, or for otherwise incurring costs to accommodate the attacher's demand. Pole owners have the opportunity to recover through make-ready fees all of the capital costs caused by third-party attachers. Importantly, the utility itself sets these fees as are appropriate – they are not subject to any mandatory rate formula set by the Commission.[572]

186. As discussed below, the record demonstrates that attachers do not cause pole owners to incur capital costs if there is space available on an existing pole to accommodate an attachment. For that reason, none of the capital cost of a pole is included in the lower-bound telecom recurring pole rental rate (and none is recovered through the make-ready fees). In accordance with the economic and legal principles set forth above, the lower-bound rate is not a subsidized rate, even though it excludes capital costs, because the attacher does not cause the utility to incur capital costs in this case. Excluding capital costs from the lower-bound rate, while at the same time allowing recovery of all of the capital costs caused by third-party attachers through the make-ready fees, prevents a subsidy that would result from under-recovery of capital costs.

187. Moreover, as one party points out, in cases where an attacher pays make-ready fees to upgrade or to add capacity to an existing pole, or for a new, taller pole to accommodate that attacher's

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[570] *See, e.g.*, APPA Reply at 15–16; Coalition Comments at 112–13; EEI/UTC Comments at 71–73; Letter from Aryeh B. Fishman, Director, Regulatory Legal Affairs, and John Caldwell, Director of Economics, EEI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, Report of Kaustuv Chakrabarti *passim* (filed Dec. 14, 2010) (EEI/UTC Chakrabarti Report).

[571] *Alabama Power Co. v. FCC*, 311 F.3d at 1370. *See also* William J. Baumol and Dietrich Fischer, Super Fairness: Applications and Theory, Ch. 6 (1986); Gerald R. Faulhaber, *Cross-Subsidization: Pricing in Public Enterprises*, 65 AM. ECON. REV. 966, 966–77 (1975). The economic test developed by Faulhaber requires that the revenues a firm derives from each service or group of services cover their own individual incremental costs. *Faulhaber, id.* The complexity of the calculations and the voluminous information required to even roughly approximate the incremental revenues and costs for each group of services precludes such an analysis here, especially given Congress' instruction that the Commission institute a "simple and expeditious" pole attachment regulatory program rather than requiring protracted proceedings and complicated pricing investigations. *See 1977 Senate Report* at 21.

[572] We note that parties can seek Commission review of make-ready charges to the extent that they believe such charges are unjust or unreasonable. *See, e.g., Knology v. Georgia Power*, 18 FCC Rcd 24615 (2003) ("Utilities are entitled to recover their costs from attachers for reasonable make-ready work necessitated by requests for attachment. Utilities are not entitled to collect money from attachers for unnecessary, duplicative, or defective make-ready work."); *Kansas City Cable Partners v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 (Cable Serv. Bur. 1999) (attacher responsible only for cost of work made necessary because of its attachments).

demand, the utility, not the attacher, owns the pole.[573] The utility therefore benefits from this situation in a number of ways, including its recovery upfront of all of the costs the third-party attacher causes it to incur. In particular, because poles typically come in standard sizes, the utility is likely to obtain, at no cost to itself, capacity above and beyond the additional foot of pole space needed to accommodate the typical third-party attachment. The utility benefits from the extra capacity because it can use that capacity to supply its own services, rent the capacity to other third-party attachers and realize additional revenues, and/or save or defer some of the cost of periodic pole replacement needed to provide its own service.

188. *Rational Firm Behavior.* We find that a third-party pole attacher causes none of the capital cost of the available space on an existing pole used to satisfy the attachment demand. We base this finding on basic economic theory and the absence of evidence in the record to support a contrary conclusion. We first discuss economic theory. As we noted in the *Further Notice,* section 224 imposes no obligation on pole owners to anticipate the need to accommodate communications attachers when deploying poles.[574] We agree with commenters who claim that there is uncertainty surrounding future attachment demand, and therefore there is the risk that the additional cost of extra pole capacity installed in anticipation of additional demand would not be recovered.[575] Moreover, as discussed, the rules we adopt would impose no unrecoverable cost on the utility, but rather would provide a benefit to the utility, insofar as a utility that has not considered third party demand is able to install a new pole at the new attacher's expense. Therefore, we agree with TWTC that utilities typically would not install such extra capacity in advance purely to accommodate possible telecommunications carrier or cable attachers.[576] Rather, we conclude that utilities would install poles based on an assessment of their own needs and, to the extent that future attachments could not be accommodated on such poles, leave it to the new attacher to pay the cost of the new pole.[577] In this manner, utilities are certain to recover the full cost of the additional capacity through make-ready charges.

189. We next discuss assertions by the utilities that third-party attachers cause some of the capital costs of a pole that has space available to accommodate an attachment. In the *Further Notice,* the Commission requested that pole owners, to the extent that they contend they incur significant capital costs outside the make-ready context solely to accommodate third party attachers, provide the nature and extent of those costs.[578] The Commission noted that the Coalition of Concerned Utilities argues that: (a) communications attachers are responsible for incremental capital costs for the extra space on taller poles; and (b) those costs exceed the attachers' share of the capital costs for an entire pole that the attachers bear under the fully distributed cost methodology reflected in the Commission's existing rate formulas.[579] In particular, the Coalition argues that utilities install taller poles routinely throughout their networks to satisfy their own needs and anticipated third-party attachment demand, and that they do not receive sufficient compensation for this option.[580] The Commission questioned whether such practices

[573] Comcast Kravtin Report at 30.

[574] *Further Notice*, 25 FCC Rcd at 11920 n.365.

[575] Comcast Pecaro Decl. at 9–11.

[576] *Id.*

[577] *Id.*

[578] *Further Notice*, 25 FCC Rcd at 11921, para. 136.

[579] Letter from Jack Richards on behalf of the Coalition of Concerned Utilities to Edward P. Lazarus, Chief of Staff, FCC, WC Docket No. 07-245 at 2 (filed May 4, 2010) (Coalition May 4, 2010 *Ex Parte* Letter) (contending that utility pole owners are not reimbursed for "the considerable additional costs ($180–$310 per pole) required to construct pole distribution systems that are taller and more expensive than the utilities need for their own purposes. These additional capital costs are caused directly by the communications attachments, but they are not recoverable by the utilities since the rate formula does not allow for recovery of incremental capital costs.").

[580] Coalition May 4, 2010 *Ex Parte* Letter at 1–2.

indeed were routine or widespread ,[581] but nevertheless invited parties to submit studies that isolate and quantify the effect of third-party attachment demand on pole height and therefore pole investment.[582]

190. Electric utilities in response to the *Further Notice* did not provide any cost study, let alone one that might demonstrate that pole owners incur capital costs outside the make-ready context solely to accommodate third-party attachers. The utilities are in the best position to develop the most credible studies because they possess the required data and information regarding the costs of owning, installing, and maintaining poles. We find it reasonable to conclude, therefore, based on our analysis of rational firm behavior and the lack of any evidence provided by the utilities to refute it, that pole owners do not incur such costs.[583]

191. *Maintenance and Administrative Costs.* We find, based on the record, that the amount of maintenance and administrative costs reflected in the lower-bound telecom rate is not subsidized. The lower-bound rate includes a share of the fully allocated amount of these costs, based on both the usable and the unusable space allocators in section 224(e)(2) and (3).[584] In fact, the lower-bound rate includes a greater proportion of maintenance and administrative costs than does the existing cable rate. That is because the allocation of maintenance and administrative costs attributed to unusable space by the lower-bound rate formula is greater than the allocation of maintenance and administrative costs attributed to unusable space in the cable rate formula.[585] Courts have upheld the existing cable rate, finding it to be a fully compensatory rate.[586] It follows that the amount of maintenance and administrative costs included in the lower-bound rate also fully compensate the pole owner for costs caused by third-party attachments, based on the same legal reasoning the courts applied in evaluating the existing cable rate.

192. *Unusable Space.* The utilities are incorrect in their assertions that the section 224(e)(2) allocator apportions too little of the cost of unusable space to third-party attachers and creates a subsidized rate.[587] This allocation does not create a subsidized rate because unusable space costs are

[581] *Further Notice*, 25 FCC Rcd at 11920–21, paras. 135–36 & n.365.

[582] *Further Notice*, 25 FCC Rcd at 11921, para. 136 & n.371. The Commission provided specific guidance on how commenters might demonstrate that investment in taller poles, if any, would not have been made 'but for' the communications attachers. *Id.* (requesting cost studies that keep certain variables constant, separately quantify any additional investment not recovered in make-ready fees, include calculations on a per pole basis and on a per pole per attacher basis, describe analytical techniques used, and explain what data was sampled).

[583] We note that the Coalition provides only an anecdotal assertion of additional capital costs that would not be incurred "but for" communications attachers. *See* Coalition Comments at 109–12 (asserting that four Coalition members install taller poles than would be needed if the electric utility were the only attacher and alleging that pole replacements can be more frequent and/or more costly when poles have communications attachers). As we stated, without a cost study, we are unable to find that these represent "substantial incremental capital expenditures" or that "[c]ommunications attachers demonstrably add significantly to electric utility capital expenditures," as utilities claim. *See* Coalition Comments at 109–11. *See also* TWTC/Comptel Wood Decl. at 16–23 (refuting each of the Coalition's claims).

[584] 47 U.S.C. § 224(e)(2)–(3).

[585] *See supra* note 397. The allocation of unusable space costs in the existing telecom rate exceeds the allocation of these costs in the cable rate, given the Commission's rebuttable presumptions. The allocation of maintenance and administrative costs attributed to unusable space is the same in the existing telecom rate and the lower-bound rate because the formulas for both rates apportion the same fully allocated amount of maintenance and administrative costs and do so using the same unusable space allocator. Accordingly, the allocation of maintenance and administrative costs attributed to unusable space in the lower-bound rate exceeds the allocation of these costs in the cable rate.

[586] *See generally FCC v. Florida Power Corp.*, 480 U.S. 245; *Alabama Power Co. v. FCC*, 311 F.3d 1357.

[587] EEI/UTC Chakrabarti Report at 5, 7 n.6.

common costs, as certain utilities point out.[588] These common costs do not vary with the number of attachers on a pole.[589] Thus, none of these costs is caused by the attacher. Based on the legal and economic principles discussed above, the entire amount of these costs could be excluded from the lower-bound rate without resulting in a subsidized rate.[590]

193. *Usable Space.* We also conclude that the attacher's share of the fully allocated maintenance and administrative costs relating to usable space reasonably represents the extent to which the attacher causes these costs.[591] The relative use allocator in section 224(e) aligns with cost causation principles because it apportions these costs on the basis of the fraction of the pole occupied by the attacher, thereby producing an allocation that is commensurate with use. Moreover, the share of usable space is the allocator that Congress specified for both the cable rate formula and the existing telecom rate formula. Likewise, courts have upheld rates reflecting costs apportioned using this allocator.[592]

194. We noted in the *Further Notice* that the Coalition of Concerned Utilities argues that the incremental operating costs for attachments, which utilities contend are caused by communications attachers, exceed the operating costs for a pole that the attachers bear under the Commission's pre-existing implementation of the telecom rate.[593] We remain skeptical of this claim because we would expect that a significant portion of the pole-related maintenance and administrative expenses would be incurred for routine activities unrelated to the number of attachments. We nevertheless invited parties wishing to rebut that position to "submit studies that isolate and quantify the effect of third-party attachment demand on operating expenses."[594] Utilities, in response to the *Further Notice*, did not provide a study that might demonstrate that the maintenance and administrative costs caused by third-party attachers exceed the share of these costs the attachers bear under the fully distributed cost methodology reflected in the Commission's existing telecom rate formula, which, in turn, is equal to the share reflected in the lower-bound rate. Given the absence of such evidence in the record, we find the maintenance and administrative costs reflected in the lower bound rate are not subsidized amounts.

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[588] Alliance Comments at 78 n.157; EEI/UTC Chakrabarti Report at 5. Common costs are incurred in the production of multiple products or services, and remain unchanged as the relative proportion of those products or services varies. *See Local Competition First Report and Order*, 11 FCC Rcd at 15845, para. 676.

[589] Kahn, *supra* note 422.

[590] *See supra* para. 184.

[591] Utilities do not argue that the relative use allocator specified in section 224(e) apportions too little of the usable space costs to third-party attachers. Rather, their position is that the Commission's rebuttable presumptions, if used as inputs for that allocator, result in an under-allocation of usable space costs to third-party attachers. In particular, the utilities argue that the rebuttable presumptions regarding usable space and unusable space, and the Commission's treatment of worker safety space that affects these presumptions, produce this under-allocation. *See* EEI/UTC Chakrabarti Report at 6–9. We reject these assertions above. *See supra* para. 180.

[592] *See generally FCC v. Florida Power Corp.*, 480 U.S. 245; *Alabama Power Co. v. FCC*, 311 F.3d 1357.

[593] *Further Notice*, 25 FCC Rcd at 11922, para. 138 (citing Coalition May 4, 2010 *Ex Parte* Letter at 2 (contending that "annual operating expenses that are caused solely by communications attachers" add considerable costs, and "[t]he Commission's rate formulas allow recovery of only a small fraction of these costs. . . . [F]or instance, the mechanics of the pole attachment formula reduce recovery to a minute percentage, far less than even the tiny 7.4% responsibility percentage for cable companies under the Commission's rules.")). Although the precise argument is somewhat unclear, presumably the Coalition believes that more operating costs should be included in the relevant definition of costs allocated pursuant to the section 224(e) methodology.

[594] *Further Notice*, 25 FCC Rcd at 11922, para. 138 & n. 377 (discussing elements of such a study). The Commission provided specific guidance on how commenters might demonstrate the amount of operating expenses, if any, that would not have been incurred "but for" the communications attachers. *Id.* (requesting cost studies that keep certain variables constant, include calculations on a per pole basis and on a per pole per attacher basis, describe analytical techniques used, and explain what data was sampled).

195. In conclusion, we find that the lower-bound telecom rate and the make-ready fees together do not subsidize third-party pole attachers because these rates recover more than the costs caused by attachers. Specifically, these rates recover all the capital costs caused by attachers, and an amount of maintenance and administrative costs that exceeds the amount caused by attachers. Moreover, the pole owner benefits from the extra capacity it obtains for free in the make-ready process, in addition to recovering an amount greater than the costs caused by the attachers.

196. *Taxes.* In the *Further Notice,* the Commission stated that, under its proposal, taxes would be treated as part of the capital costs that are excluded from the lower-bound telecom rate.[595] Parties identified and commented on two types of relevant taxes: income taxes[596] and property taxes.[597] As discussed below, we find it appropriate to exclude both types of taxes from the lower-bound rate.

197. Consistent with the cost-causation principles underlying our lower-bound telecom rate, we exclude income taxes because third-party attachers do not cause utilities to incur these expenses.[598] As we stated in the *Further Notice*, income taxes are capital costs because they apply to the return stockholders receive for providing funds used to pay for the pole.[599] Under our approach, if a new attachment would give rise to capital costs, the attacher bears those costs through make-ready fees.[600] Where no capital costs arise from a new attachment, the new attacher has "caused" none of the capital outlay on which stockholders earn a return and therefore none of the corporate income taxes on that return. Accordingly, income taxes are excluded from the lower-bound rate.

198. We likewise find that property taxes should be excluded from the lower-bound telecom rate because there is no evidence in the record that third-party attachers cause pole owners to incur these expenses. In theory, if a pole owner places a new pole to accommodate a third-party attachment, the value of that owner's pole stock could increase. That increase, in turn, could increase the pole owner's property taxes, if property taxes are assessed based on an estimate of property values. We are persuaded by the record, however, that such a theoretical property tax increase, if any, would be insignificant. For one, the record indicates that new poles seldom are installed to accommodate third-party attachment demand.[601] Moreover, the magnitude of any increase in value of the owner's stock of poles arising from a new pole would be expected to reflect only the *extra* capacity provided by the new pole. Commenters did not provide data demonstrating the increase in value – if any – likely to result under these circumstances;

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[595] *Further Notice*, 25 FCC Rcd at 11922 n.372. Income taxes are capital costs because they apply to the return equity holders receive for providing funds used to pay for the pole. ROGER A. MORIN, REGULATORY FINANCE: UTILITIES' COST OF CAPITAL 409–11 (1994).

[596] Kravtin refers to "revenue-related" taxes without distinguishing these from income taxes. *See* NCTA Comments Attach. A, Patricia D. Kravtin Report at 36 (NCTA Kravtin Report).

[597] Pecaro notes possessory interest taxes, which are similar to the property taxes the owner of private property pays. *See* Comcast Pecaro Decl. at 13. A possessory interest tax is paid by an entity that uses government property and typically is based on the assessed value of that property.

[598] *See* Comcast Pecaro Decl. at 12–13; NCTA Kravtin Report at 36; Mahanger Reply at 17–18.

[599] A stockholder is a legal owner of one or more shares of the capital stock of a corporation. *See* Eric L. Kohler, *A Dictionary for Accountants* at 457 (5th Ed.) (1975). Capital stock, in turn, refers to the ownership shares of a corporation authorized by its articles of incorporation. *Id.* at 84.

[600] *See supra* paras. 144, 161.

[601] For example, data provided by Oncor indicates that only 0.9% and 0.5% of the poles for which attachers requested access were replaced at the attachers' expense through make-ready fees in 2008 and 2009, respectively. *See* EEI/UTC Chakrabarti Report at 9–10. *See also Ex Parte* Letter from Joseph A. Lawhorn, Counsel to Georgia Power Co. and Southern Communications Services, to Marlene H. Dortch, Secretary, FCC, Attach. B, slide 4 (filed Nov. 17, 2009). This letter describes an actual project in which only 4 of 294 poles, or 1.4%, had to be changed out to accommodate new attachments by a cable company.

nor did they demonstrate that any such increase would have a practical impact on property taxes that should be reflected in pole attachment rates. Moreover, we question whether any taxes incurred on these could exceed the increased value of the new poles, which the utility now will own.

C. Incumbent LEC Pole Attachments

199. As explained below, historically incumbent LECs owned roughly as many poles as electric utilities, and it appears that incumbent LECs were generally able to ensure just and reasonable rates, terms and conditions for pole attachments by negotiating "joint use" agreements.[602] The record demonstrates that incumbent LECs own fewer poles now than in the past, and this relative change in pole ownership may have left incumbent LECs in an inferior bargaining position to other utilities.[603] As a result, at least in some circumstances, market forces and independent negotiations may not be alone sufficient to ensure just and reasonable rates, terms and conditions for incumbent LECs pole attachments.

200. The Commission sought comment on the possibility of regulating the rates incumbent LECs pay for attachments in the 2007 *Pole Attachment Notice*. In particular, the Commission sought comment on the extent of the Commission's authority to regulate pole attachment rates for incumbent LECs, as well as "possible changes in bargaining power between electric utilities and incumbent LECs, and whether pole attachment rates paid by incumbent LECs could affect the vitality of competition to deliver telecommunications, video services, and broadband Internet access service."[604] The *Pole Attachment Notice* tentatively concluded that incumbent LECs (as with other broadband providers) should pay a regulated rate for pole attachments and "that the rate should be higher than the current cable rate, yet no greater than the telecommunications rate."[605]

201. In the 2010 *Further Notice*, the Commission asked parties to refresh the record on the issues raised in the *Pole Attachment Notice* "both in light of the specific telecom rate proposals, as well as the factual findings of the National Broadband Plan."[606] In addition, the Commission sought comment "on the relationship between the pole rental rates paid by incumbent LECs and any other rights and responsibilities they have by virtue of their pole access agreements with utilities," such as joint use agreements, and whether any remedies otherwise were available to incumbent LECs absent the ability to file complaints with the Commission.[607] The *Further Notice* also sought comment on proposals under which incumbent LECs' regulated rate would be an existing rate, whether the cable rate, the pre-existing telecom rate, or any new rate adopted in this proceeding, or an alternative rate, as well as how to balance the rate paid with the other terms and conditions in incumbent LECs' pole attachment agreements with other utilities.[608]

202. Based on the record in this proceeding, we find it appropriate to revisit our interpretation of section 224 with respect to rates, terms and conditions for pole attachments by incumbent LECs.[609]

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[602] *See, e.g.*, AT&T Reply at 9; Coalition Reply at 36; Florida IOUs Reply at 27–28; Frontier Mar. 8, 2011 *Ex Parte* Letter at 1.

[603] *See infra* para. 206 (describing record evidence).

[604] *Pole Attachment Notice*, 22 FCC Rcd at 20201–06, paras. 15–16, 23–25.

[605] *Id.* at 20209, para. 36.

[606] *Further Notice*, 25 FCC Rcd at 11924–25, para. 143.

[607] *Id.* at 11925–27, paras. 145, 148.

[608] *Id.* at paras. 143–47.

[609] Given the extensive comment sought on these issues, *see, e.g.*, *supra* paras. 200–201, we reject some commenters' suggestion that the Commission lacks adequate notice. *See, e.g.*, Letter from Sean B. Cunningham, Counsel for the Alliance for Fair Pole Attachment Rules, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, Attach. at 1–2 (filed Mar. 31, 2011) (Alliance Mar. 31, 2011 *Ex Parte* Letter).

Although incumbent LECs have no right of access to utilities' poles pursuant to section 224(f)(1) of the Act, we now conclude that where incumbent LECs have such access, they are entitled to rates, terms and conditions that are "just and reasonable" in accordance with section 224(b)(1).

203. We therefore allow incumbent LECs to file complaints with the Commission challenging the rates, terms and conditions of pole attachment agreements with other utilities. Given that incumbent LECs often can be differently situated from other attachers, both due to the terms of existing joint use agreements and because of their continuing pole ownership, we conclude that it would not be appropriate to treat them identically to telecommunications carrier[610] or cable operator attachers in all circumstances. Instead, we identify a number of factors that the Commission will consider in determining whether a particular rate, term, or condition is just or reasonable pursuant to section 224(b)(1). This guidance will provide greater clarity to the industry, improve the administrability of Commission complaint proceedings involving incumbent LEC attachers, and seek to strike the most appropriate balance in ensuring just and reasonable rates given the particular terms and conditions of an incumbent LEC's agreement for pole access.

1. Statutory Analysis

204. Section 224 uses two separate terms to refer to telephone companies that are pole attachers. The statute uses the term "telecommunications carrier," and contains a definition of that term that takes as a starting place the definition of the same term in section 3 of the Act.[611] The definition in section 224, however, deviates from the section 3 definition by excluding incumbent LECs.[612] In most places, section 224 uses the term "telecommunications carrier." In one critical place—the definition of a "pole attachment," the statute refers to "provider of telecommunications service."[613] Here, we explain why we decide to interpret section 224 to authorize the Commission to ensure that the rates, terms and conditions of incumbent LECs' pole attachments are just and reasonable, and why we believe that the definition of "pole attachment" leads to an interpretation of section 224(b) that permits the Commission to do so.

205. In implementing section 224, as amended by the 1996 Act, the Commission interpreted the exclusion of incumbent LECs from the term "telecommunications carrier" to mean that section 224 does not apply to attachment rates paid by incumbent LECs.[614] Although these decisions did not consider alternative interpretations of incumbent LECs' rights under section 224 in detail, the Commission's interpretation appears to have been based in part on incumbent LECs' status as pole owners and thus "utilities" under section 224,[615] and in part on the view that "Congress' intent" was to "promote competition by ensuring the availability of access to new telecommunications entrants."[616]

206. We find it appropriate to change the Commission's prior interpretation of section 224(b) with respect to incumbent LECs given the evidence in the record regarding current market realities. Over

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[610] For purposes of this Part, we use the term "telecommunications carrier" as it is defined in section 224(a)(5).

[611] 47 U.S.C. § 224(a)(5).

[612] *Id.*

[613] *Id.* § 224(a)(4).

[614] *See, e.g., Local Competition Order*, 11 FCC Rcd at 16059–60, 16103–04, paras. 1123 n.2734, 1231; *1998 Implementation Order*, 13 FCC Rcd at 6781, para. 5; *2001 Order on Reconsideration*, 16 FCC Rcd at 12106, para. 2 n.12.

[615] *See, e.g., 1998 Implementation Order*, 13 FCC Rcd at 6781, para. 5 (noting that "for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier," and thus "the ILEC has no rights under Section 224 with respect to the poles of other utilities.").

[616] *1998 Implementation Order*, 13 FCC Rcd at 6781, para. 5 (citing S. Rep. No. 104-230).

time, aggregate incumbent LEC pole ownership has diminished relative to that of electric utilities. Today, incumbent LECs as a whole appear to own approximately 25-30 percent of poles and electric utilities appear to own approximately 65-70 percent of poles, compared to historical ownership levels that that were closer to parity.[617] Thus, incumbent LECs often may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations in some cases.[618] Further, although we agree with the Commission's prior assessment that "Congress' intent" in section 224—and the 1996 Act more broadly—was to "promote competition," we believe this intent was not limited to entities that were "new telecommunications entrants" at the time of the 1996 Act.[619] The Commission has recognized that the incumbent LECs' historical monopoly over local telephone service has not always translated into marketplace power with respect to some new services they began to offer subsequent to the 1996 Act.[620]

207. In reviewing the Commission's prior interpretation of section 224, we note that even incumbent LECs acknowledge that they are excluded from the section 224 definition of "telecommunications carrier,"[621] and generally concede that they thus have no statutory right to

[617] Qwest, for example, asserts that it co-owns some 970,000 poles, while it is a non-owning attacher on 1.4 million poles. Qwest Comments at 2. Frontier states that, for the 20 largest joint use agreements with investor-owned utilities in newly-acquired Frontier properties, Frontier is attached to 642,594 poles owned by other entities, while other utilities are attached to just 137,552 poles owned by Frontier. Letter from Michael D. Saperstein, Jr., Director of Federal Regulatory Affairs, Frontier Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, Attach. at 8 (filed Mar. 8, 2011) (Frontier Mar. 8, 2011 *Ex Parte* Letter). *See also, e.g.*, AT&T Comments at 18; Mahanger Reply at 9–13; AT&T Reply at 9; Verizon Comments, Decl. of James Slavin and Steven R. Frisbie at para. 13 (Verizon Slavin/Frisbie Decl.); Letter from Jennie B. Chandra, Senior Counsel, Federal Policy, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 (filed Mar. 11, 2011) (Windstream Mar. 11, 2011 *Ex Parte* Letter); 1977 Senate Report at 13, *reprinted in* 1978 U.S.C.C.A.N. at 121 (noting that, at that time, "53 percent [of poles] are controlled by power utilities, public and private.").

[618] Standard economic theories of bargaining predict that each party will consider its best alternative to a negotiated agreement when negotiating. *See, e.g., Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.*, MB Docket No. 10-56, Memorandum Opinion and Order, FCC 11-4 at para. 36 (rel. Jan. 20, 2011) (citing AVINASH DIXIT AND SUSAN SKEATH, GAMES OF STRATEGY 524–47 (1999); Kenneth Binmore, Ariel Rubinstein & Asher Wolinsky, *The Nash Bargaining Solution in Economic Modeling*, 17:2 RAND J. OF ECON., 176–188 (1986)). As a hypothetical illustration, if the electric company owned 90% of poles in an area and the incumbent LEC owned 10%, and if the best outside alternative for each party was deploying the remaining needed poles (and having the legal right to do so), the electric utility would face the cost of deploying 10% of poles, while the incumbent LEC would face the cost of deploying 90% of poles. As a result, the incumbent LEC would have less bargaining power than the electric utility. However, if there were less-costly alternatives for the incumbent LEC to pole deployment, or additional costs that the electric utility would need to consider under the best outside alternative, this would reduce the disparity in the relative bargaining power of the parties.

[619] *1998 Implementation Order*, 13 FCC Rcd at 6781, para. 5. We therefore reject the claims of some commenters that Congress did not intend section 224 to be used to promote competition by incumbent LECs. *See, e.g.*, Alliance Mar. 31, 2011 *Ex Parte* Letter, Attach. at 3–6. Nor does our regulatory authority to ensure just and reasonable rates, terms and conditions when incumbent LECs attach to other utilities' poles preclude us from also regulating incumbent LECs as pole owners. *See, e.g., id.*

[620] *See, e.g., Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments*, Report & Order & Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007) (discussing the impact of exclusivity arrangements for multiple dwelling units on new entry by local exchange carriers, including incumbent LECs, into the provision of video services); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18474, para. 75 (2005) (observing that, at the time of the transaction, Verizon's effort to serve "medium-sized and large enterprise customers with national, multi-location operations" was "nascent").

[621] 47 U.S.C. § 224(a)(5) ("For purposes of this section, the term 'telecommunications carrier' (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.").

nondiscriminatory pole access under section 224(f)(1).[622] That is, they agree that because section 224(f)(1) requires utilities to provide nondiscriminatory access to "telecommunications carriers," which exclude incumbent LECs, they have no statutory right of nondiscriminatory access to poles, ducts, conduits or rights-of-way under this provision of the Act.[623] We agree. They also contend, however, that sections 224(b)(1) and 224(a)(4) provide an independent right to reasonable rates, terms and conditions for any pole attachment by a *provider of telecommunications service*, and that the statute thus mandates the Commission to apply the "just and reasonable" standard to pole attachments for all such providers, including incumbent LECs.[624]

208. We are persuaded to revisit our prior conclusion,[625] and instead adopt a new interpretation of section 224(b). Specifically, we find that the Commission has authority to ensure that incumbent LECs' attachments to other utilities' poles are pursuant to rates, terms and conditions that are just and reasonable.[626] For one, this reflects the marketplace evidence discussed above. This also reflects the fact that actions to reduce input costs, such as pole rental rates, can expand opportunities for investment, especially in combination with other actions, which is particularly important given the up to 24 million Americans that do not have access to broadband today.[627] Under section 706 of the 1996 Act, Congress directed the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans by utilizing, in a manner consistent with the public interest . . . measures that promote competition . . . or other regulatory methods that remove barriers to infrastructure investment."[628] As noted above, in principle, the rates charged for pole access are likely to affect deployment decisions for all telecommunications carriers, including incumbent LECs.[629] In this regard, we note that incumbent

[622] *See, e.g.*, USTelecom Comments at 5; Verizon *NPRM* Comments at 10; ITTA *NPRM* Reply at 4.

[623] 47 U.S.C. § 224(f)(1) ("A utility shall provide . . . any telecommunications carrier with nondiscriminatory access to any pole . . . ."). Although some commenters contend that incumbent LECs broadly lack a statutory right to access, USTelecom asserts that incumbent LECs do, however, have some access rights under section 224(b)(1). *Compare, e.g.*, Alliance Mar. 31, 2011 *Ex Parte* Letter at 3, Attach. at 9–10 (citing Supreme Court precedent as confirming that cable operators possessed no general right of access under section 224(b)(1) and arguing that incumbent LECs may be denied access to poles) *with, e.g.*, Letter from Glenn Reynolds, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 at 1 (filed Mar. 29, 2011) (arguing that incumbent LECs have some access rights pursuant to section 224(b)(1)); *Telephone Company-Cable Television Cross-Ownership Rules*, Further Notice of Inquiry and Notice of Proposed Rulemaking, CC Docket No. 87-266, 3 FCC Rcd 5849, 5854, para. 21 & n.16 (1988) (observing that "[s]ome limitations do exist on the ability of carriers to deny independent cable operators access to poles" and citing prior Commission decisions in that regard). As described below, a finding that incumbent LECs have statutory access rights is not necessary to conclude that incumbent LECs have the right to just and reasonable rates, terms and conditions governing their attachments to other utilities' poles under section 224(b)(1). *See infra* para. 212. We therefore need not, and do not, resolve this argument here.

[624] *See, e.g., Pole Attachment Notice*, 22 FCC Rcd at 20204–06, paras. 23–25 (discussing incumbent LECs' theory of statutory interpretation); AT&T Comments at 4–8; USTelecom Comments at 12–18; NTCA *et al.* Comments at 3; Verizon Comments at 5–10.

[625] The Commission has discretion to change its interpretation of the Act, so long as it acknowledges that it is doing so and provides a reasoned explanation for the change. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810–11 (2009).

[626] As with the Commission's other pole attachment regulations, our jurisdiction does not extend to states that have certified that they regulate pole attachments, *see* 47 U.S.C. § 224(c), nor do we have jurisdiction under section 224 over "any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State." 47 U.S.C. § 224(a)(1).

[627] *See id.* (citing *Sixth Broadband Deployment Report*, 25 FCC Rcd at 9574, para. 28).

[628] 47 U.S.C. § 1302(a).

[629] *See supra* Part V.B.

LECs estimate that, in aggregate, they annually pay pole attachment rates that are $320 to $350 million greater than they would pay at the cable rate.[630] Incumbent LECs identify five specific categories of consumer benefits arising from ensuring just and reasonable rates for incumbent LECs' attachments to other utilities' poles: (1) reduced demand on the universal service fund arising from reduced incumbent LEC costs; (2) automatic flow-through of cost reductions to the regulated rates of rate-of-return incumbent LECs; (3) use of cost savings to improve service and/or lower prices for broadband services in areas with competition; (4) increased broadband deployment in areas where incumbent LECs currently do not provide broadband due to the improved business case; and (5) a source of capital for expansion.[631] We expect these promised consumer benefits to occur, and we encourage incumbent LECs to provide data to the Commission on an ongoing basis demonstrating the extent to which these benefits are being realized. We would be concerned if these consumer benefits were not realized. We will continue to monitor the outcomes of this Order, and in the absence of evidence that expected benefits are being realized, we may, among other things, revisit our approach to this issue.[632]

209. As an initial matter, we conclude that neither the language or structure of section 224 precludes our finding that incumbent LECs are entitled to pole attachment rates, terms and conditions that are just and reasonable pursuant to section 224(b)(1). The Commission's authority to regulate the rates, terms and conditions of pole attachments by incumbent LECs derives principally from section 224(b) of the Act. In particular, section 224(b)(1) provides that the Commission "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."[633] The statute defines the term "pole attachment," in turn, as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[634] While the statute does not define the term "provider of telecommunications service" for the purpose of applying section 224(b)(1), it defines "telecommunications carrier," a term that is used in other subsections of the statute.[635]

210. Although section 224(a)(5) cites section 3 as a starting point for defining "telecommunications carrier," by excluding incumbent LECs, it deviates from that baseline, resulting in a definition that is unique to section 224. In addition, where Congress did not intend for the Commission to

[630] Letter from Walter B. McCormick, Jr., USTelecom, to Hon. Julius Genachowski, Chairman, FCC, WC Docket No. 07-245, GN Docket No. 09-51 at 5 (filed Mar. 31, 2011) (USTelecom Mar. 31, 2011 *Ex Parte* Letter).

[631] *See generally* USTelecom Mar. 31, 2011 *Ex Parte* Letter. As discussed above, under economic and legal principles, a given service is not subsidized by other services if the rate for the service produces revenues that cover all of the costs caused by the service. *See supra* para. 184. We thus are not persuaded by the claims of some commenters that a possible reduction in pole attachment rates paid by an incumbent LEC inherently would result in a subsidy of the incumbent LECs' services. *See, e.g.*, Alliance Mar. 31, 2011 *Ex Parte* Letter, Attach. at 11.

[632] This approach addresses concerns that pole rate reductions for incumbent LECs might not yield consumer benefits. *See, e.g.*, Letter from Sean B. Cunningham and Mark S. Menezes, counsel for the Alliance for Fair Pole Attachment Rules, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 at 2, 10 (filed Mar. 17, 2011); Letter from Eric B. Langley, counsel for the Florida IOUs, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, Attach. at 9 (filed Mar. 10, 2011).

[633] 47 U.S.C. § 224(b)(1). In addition, section 224(b)(2) provides that "[t]he Commission shall prescribe by rule regulations to carry out the provisions of this section." 47 U.S.C. § 224(b)(2).

[634] *Id.* § 224(a)(4).

[635] *See* 47 U.S.C. § 224(a)(5). Section 224(a)(5) provides: "For purposes of [section 224], the term "telecommunications carrier" (as defined in section 3 of this Act) does not include any incumbent local exchange carrier as defined in section 251(h)." *Id.*

regulate rates, terms and conditions in a particular respect, it stated this clearly.[636] Section 224's departure from the definition in section 3, coupled with the fact that Congress could have expressly excluded attachments by incumbent LECs from the Commission's jurisdiction over rates, terms and conditions under section 224(b)(1), persuade us to interpret "provider of telecommunications service" as distinct from "telecommunications carrier" for purposes of section 224.

211. Interpreting these terms as distinct leads us to conclude that the definition of "pole attachment" includes pole attachments of incumbent LECs. As noted above, that definition refers to "any attachment by a . . . provider of telecommunications service."[637] Because incumbent LECs are "providers of telecommunications service," "pole attachment" as defined in section 224(a)(4) includes attachments of incumbent LECs. Moreover, because section 224(b) requires the Commission to "regulate the rates, terms, and conditions for *pole attachments*,"[638] under our revised reading the Commission has a statutory obligation to regulate the attachments of incumbent LECs. Particularly given the marketplace and other evidence discussed above,[639] we find such an interpretation appropriate.

212. Contrary to the assertions of some parties, we are not persuaded that the structure of section 224 counsels against interpreting "provider of telecommunications service" to encompass incumbent LECs. Specifically, some commenters observe that section 224(a)(5) defines "telecommunications carrier" by reference to section 3 of the Act, which in turn defines a "telecommunications carrier" as "any provider of telecommunications services . . . ." [640] These commenters thus argue that "telecommunications carrier" and "provider of telecommunications service" should be interpreted as synonymous in section 224,[641] as the Commission initially did. We disagree. For one, the absence of a statutory right to nondiscriminatory pole access for incumbent LECs under section 224(f) is not incompatible with the Commission's exercise of authority to ensure just and reasonable rates, terms and conditions in situations where incumbent LECs are able to obtain access to poles.[642] Indeed, a regime of regulated rates without a statutory right of access was in place for pole attachments by cable operators between 1978 (when section 224 was first adopted) and 1996 (when Congress first added a right to attach to section 224). Congress' decision not to grant incumbent LECs a general right of nondiscriminatory access to other utilities' poles under section 224(f) also could reflect its recognition of incumbent LECs' continued pole ownership. In particular, if Congress granted incumbent LECs both the statutory right to just and reasonable rates, terms and conditions on other utilities' poles and a general statutory right of nondiscriminatory access, incumbent LECs could rely on those rights to demand access to other utilities' poles on a regulated basis while leaving those utilities with little or no negotiating leverage to ensure just and reasonable rates, terms and conditions for their access to incumbent LECs' poles. By contrast, withholding a general statutory right of nondiscriminatory access under section 224(f) ensures the continued incentives of incumbent LECs to negotiate with other utilities with respect to access

[636] *See* 47 U.S.C. § 224(a)(1) (excluding from the definition of "utility" subject to section 224 "any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State"); 47 U.S.C. § 224(c) (providing that the Commission has no jurisdiction under section 224 to regulate pole attachment matters in states that have certified that they regulate pole attachments).

[637] *Id.* § 224(a)(4).

[638] *Id.* § 224(b)(1).

[639] *See supra* paras. 206, 208.

[640] *See, e.g.*, Coalition Comments at 139–40 (quoting 47 U.S.C. § 153(44)). *See also, e.g.*, Alliance Reply at 81–87; Letter from Jeffrey L. Sheldon, Counsel for EEI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 at 1 (filed Mar. 4, 2011) (EEI Mar. 4, 2011 *Ex Parte* Letter).

[641] *See id.*

[642] *See, e.g.*, Coalition Comments at 140.

to its poles, while also providing a mechanism to ensure that rates, terms and conditions ultimately are just and reasonable.[643]

213. Likewise, although sections 224(d) and (e) prescribe specific rate formulas for pole attachments by cable operators and telecommunications carriers, respectively, the existence of those provisions does not evince Congressional intent to prevent the Commission from adopting "just and reasonable" rates for incumbent LEC pole attachments pursuant to section 224(b)(1). As the Supreme Court observed in *NCTA v. Gulf Power*:

> Congress did indeed prescribe two formulas for 'just and reasonable' rates in two specific categories; but nothing about the text of §§ 224(d) and (e), and nothing about the structure of the Act, suggest that these are the exclusive rates allowed. It is true that specific statutory language should control more general language when there is a conflict between the two. Here, however, there is no conflict. The specific controls but only within its self-described scope.[644]

Thus, the fact that pole attachments by incumbent LECs are not within the "self-described scope" of section 224(d) or (e) does not preclude the Commission from ensuring that the rates for those attachments are just and reasonable under section 224(b).

2. Guidance Regarding Commission Review of Incumbent LEC Pole Attachment Complaints

214. Having found that section 224(b) enables the Commission to ensure that pole attachments by incumbent LECs are accorded just and reasonable rates, terms and conditions, we recognize the need to exercise that authority in a manner that accounts for the potential differences between incumbent LECs and telecommunications carrier or cable operator attachers. As we observed in the *Further Notice*, the issues related to rates for pole attachments by incumbent LECs raise complex questions, both with respect

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[643] Nor does this interpretation create an inconsistency with section 251(b)(4) of the Act, as some commenters allege. *See, e.g.*, Alliance Mar. 31, 2011 *Ex Parte* Letter, Attach. at 12–13. Section 251(b)(4) requires all LECs to "afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224." 47 U.S.C. § 251(b)(4). However, giving "deference to the specific denial of access under section 224 over the more general access provisions of section 251(b)(4)," the Commission previously held that "incumbent LECs cannot use section 251(b)(4) as a means of gaining access to the facilities or property of a LEC." *Local Competition Order*, 11 FCC Rcd at 16103–04, para. 1231. Our actions here do not change that result, and thus do not grant incumbent LECs an access right under section 251(b)(4) that does not exist under section 224. We likewise reject claims that the absence of a state certification process under section 224(c)(2) with respect to pole "access" (as opposed to rates, terms and conditions) means that those sets of rights are inseverable, or else the Commission could be preempted from regulating pole attachments in states that do not regulate access. *See, e.g.*, Alliance Mar. 31, 2011 *Ex Parte* Letter, Attach. at 13. The Commission's implementation of section 224(c) expressly acknowledged that state regulation of pole access was distinct from state regulation of pole rates, terms and conditions, however. *Implementation of the Local Competition Provisions in the Telecommunications Act Of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, Order on Reconsideration, 14 FCC Rcd 18049, paras. 114–15 (1999). *Cf. Promotion of Competitive Networks et al.*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983, 23025, para. 93 n.239 (2000) ("We note that if it is shown in a complaint proceeding that a state does not regulate access to ducts or conduits within buildings, for example, that state's regulation of pole attachments on public rights-of-way, and its certification to such regulation, would not defeat the Commission's jurisdiction over access to ducts or conduits within buildings. In such a case, we would decide the complaint regarding in-building attachments, while continuing to respect the state's authority over those pole attachments that it does regulate.").

[644] *Gulf Power*, 534 U.S. at 335–36.

to potential remedies for incumbent LECs and the details of the complaint process itself.[645] These complexities can arise because, for example, incumbent LECs also own many poles and historically have obtained access to other utilities' poles within their incumbent LEC service territory through "joint use" or other agreements.[646] We therefore decline at this time to adopt comprehensive rules governing incumbent LECs' pole attachments, finding it more appropriate to proceed on a case-by-case basis.[647] We do, however, provide certain guidance below regarding the Commission's approach to incumbent LEC pole attachment complaints.

215. *Evidence of Bargaining Power.* We recognize that not all incumbent LECs are similarly situated in terms of their bargaining position relative to other pole owners. For example, although there has been a general trend of reduced pole ownership by incumbent LECs' relative to other utilities, there is evidence that circumstances can vary considerably from location to location.[648] Where parties are in a position to achieve just and reasonable rates, terms and conditions through negotiation, we believe it generally is appropriate to defer to such negotiations.[649] Thus, in evaluating incumbent LEC pole attachment complaints, the Commission will consider the incumbent LEC's evidence that it is in an inferior bargaining position to the utility against which it has filed the complaint.[650]

216. *Existing vs. New Agreements.* The record reveals that incumbent LECs frequently have access to pole attachments pursuant to joint use agreements today.[651] Although some incumbent LECs

[645] *Further Notice*, 25 FCC Rcd at 11925, paras. 143, 145–48.

[646] Outside of the carrier's incumbent LEC service territory, it would be subject to the pole attachment regulations applicable to a telecommunications carrier. *See* 47 U.S.C. § 224(a)(5) (excluding from the definition of "telecommunications carrier" for purposes of section 224 "any incumbent local exchange carrier as defined in section 251(h)"); 47 U.S.C. § 251(h)(1) (defining "incumbent local exchange carriers" in terms of their status with respect to a particular area).

[647] We are revising the Commission's pole attachment complaint rules to reflect the ability of incumbent LECs to file such pole attachment complaints. *See infra* App. A (discussing amendments to sections 1.1401 and 1.1403 and addition of new section 1.1424 of the Commission's rules). Under the Commission's pole attachment complaint rules, remedies for incumbent LECs would include: (1) termination of the unjust or unreasonable rate, term, or condition; (2) substitution in the contract of a just and reasonable rate, term, or condition; or (3) a refund or payment. *See* 47 CFR § 1.1410. We decline to apply our new interpretation of section 224 retroactively, and make clear that incumbent LECs only can get refunds of amounts paid subsequent to the effective date of this Order.

[648] *Compare, e.g.*, Qwest Comments at 2; AT&T Comments at 18; Windstream Mar. 11, 2011 *Ex Parte* Letter *with, e.g.*, Florida IOUs Reply at 30; Alabama Power *et al. NPRM* Reply at 14. *See also supra* note 618 (discussing relative bargaining power).

[649] *Cf. Orloff v. Vodafone Airtouch*, Memorandum Opinion and Order, File No. EB-01-MD-009, 17 FCC Rcd 8987 (2002) (generally deferring to the wireless marketplace to ensure just and reasonable and not unjustly or unreasonably discriminatory rates, terms and conditions).

[650] *See supra* note 618 (discussing considerations relevant to evaluating bargaining power).

[651] Although joint use agreements can vary from utility to utility, they tend to differ from cable and telecommunications carrier license agreements with pole owners in several ways. *See, e.g.*, Coalition Comments at 131–38; Oncor *NPRM* Comments at 25–26. Commonly, joint use agreements are structured as cost-sharing arrangements, with each party agreeing to own a certain percentage of the joint use poles. *See, e.g.*, Florida IOUs Reply at 27–28. This percentage typically is 40–50% for the incumbent LEC and 50–60% for the electric utility, and generally reflects the relative ratio of pole ownership that existed at the time these agreements originally were negotiated. *See, e.g.*, Mahanger Reply at 23–24; *see also* Oncor Comments at 66. No money changes hands under these agreements if each party owns its specified percentage of joint use poles. *See, e.g.*, Florida IOUs Reply at 27–28. A joint use agreement typically also sets forth a pole rental rate for the incumbent LEC and the electric utility that equals a percentage of the annual cost of a joint use pole. *See, e.g.*, Mahanger Reply at 3. The incumbent LEC rate typically is 40–50% of this cost, and the electric utility rate is typically 50–60%. *See, e.g.*, Mahanger Reply at 21–23. When pole ownership deviates from the agreement, the party that owns less than the specified percentage (continued....)

express concerns about existing joint use agreements,[652] these long-standing agreements generally were entered into at a time when incumbent LECs concede they were in a more balanced negotiating position with electric utilities, at least based on relative pole ownership.[653] As explained above, we question the need to second guess the negotiated resolution of arrangements entered into by parties with relatively equivalent bargaining power.[654] Consistent with the foregoing, the Commission is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable. The record also indicates, however, that both incumbent LECs and other utilities have the ability to terminate existing agreements and seek new arrangements, and that, at times, each type of entity has sought to do so.[655] To

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typically pays the other party an amount based on a per pole rate. Mahanger Reply at 21–24. That amount varies depending upon how far the number of poles owned by that party falls below what is specified under the joint use agreement. *See, e.g.*, Florida IOUs Reply at 27–28.

[652] Based on marketplace trends incumbent LECs have reported concerns about continuing to operate under these joint use agreements. In the aggregate, incumbent LECs today appear to own about 25–30% of the poles and use substantially less of the space on jointly used poles than do electric utilities. *See, e.g.*, AT&T Comments at 18; AT&T *NPRM* Comments, Decl. of Veronica Mahanger MacPhee at 4–13. Some incumbent LECs own even fewer poles relative to electric utilities in their operating areas. *See, e.g.*, Frontier Mar. 8, 2011 *Ex Parte* Letter, Attach. at 8. Incumbent LECs argue that the per-pole rate they pay typically reflects use of 40–50% of space on a pole, which they assert is a carryover from when joint agreements were originally negotiated, although they need and use less space than that today. *Id.* As a result of these changes, many incumbent LECs contend that their rental payments are unreasonably increasing. *See, e.g.*, Mahanger Reply at 21–25.

[653] *See, e.g.*, Verizon Slavin/Frisbie Decl. at paras. 13–14; AT&T Reply at 9; Frontier Mar. 8, 2011 *Ex Parte* Letter at 1.

[654] *See supra* para. 215. Nothing in the record suggests that existing agreements between incumbent LECs and electric utilities were entered into with the expectation that their provisions would be subject to Commission review. Moreover, some commenters contend that joint use agreements give incumbent LECs advantages that offset any increased rates they might pay for pole access in certain circumstances. *See, e.g.*, Oncor *NPRM* Comments at 25; Coalition Comments at 146; Comcast Reply at 24–26. As examples of incumbent LEC advantages, these parties cite: "Paying significantly lower make-ready costs; No advance approval to make attachments; No post-attachment inspection costs; Rights-of-way often obtained by electric company; Guaranteed space on the pole; Preferential location on pole; No relocation and rearrangement costs; and Numerous additional rights such as approving and denying pole access, collecting attachment rents and input on where new poles are placed." Comcast Reply at 25. Electric utilities also contend that existing joint use arrangements—in contrast to cable or telecommunications carrier pole lease agreements—reflect a decades-old contractual responsibility of incumbent LECs to share in infrastructure costs and also account for the fact that incumbent LECs still own many poles today. *See, e.g.*, Coalition Comments at 130–31; Florida IOUs Reply at 30–31. A failure to weigh, and account for, the different rights and responsibilities in joint use agreement could lead to marketplace distortions. We therefore reject arguments that rates for pole attachments by incumbent LECs should always be identical to those of telecommunications carriers or cable operators. *See, e.g.*, Letter from Glenn Reynolds, Vice President-Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 (filed Mar. 31, 2011). As discussed below, incumbent LECs have the opportunity to demonstrate that they are comparably situated to telecommunications carriers or cable operators in a particular instance.

[655] *See, e.g.*, AT&T Reply at 14; Florida IOU Reply at 33; Verizon Comments at 20; Windstream Mar. 11, 2011 *Ex Parte* Letter. Although incumbent LECs cite the potential threat of having to remove attachments from electric utility poles if an agreement is terminated, *see, e.g.*, AT&T Reply at 14, we believe that electric utilities are unlikely to pursue such actions given the likelihood that incumbent LECs would, in response, deny electric utilities access to their poles. *See, e.g.*, Coalition Reply at 36 (arguing that Coalition members "are completely dependent upon ILECs for access to ILEC-owned poles, no matter how many poles they may own"); Coalition Comments at 130 ("electric utilities are vitally dependent upon ILECs for access to a great number of ILEC poles"); *see also supra* para. 212. In addition, to the extent that an incumbent LEC can show that it was compelled to sign a new pole attachment agreement with rates, terms, or conditions that it contends are unjust or unreasonable simply to maintain pole access as a result of a utility's unequal bargaining power, *see, e.g.*, CenturyTel *NPRM* Reply at 11, we note that the "sign and sue" rule will apply here in a manner similar to its application in the context of pole attachment agreements (continued....)

the extent that an incumbent LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement, the Commission can consider that as appropriate in a complaint proceeding. The Commission will review complaints regarding agreements between incumbent LECs and other utilities entered into following the adoption of this Order based on the totality of those agreements,[656] consistent with the additional guidance we offer below.

217. *Reference to Other Agreements.* As discussed above, the historical joint use agreements between incumbent LECs and other utilities implicate rights and responsibilities that differ from those in typical pole lease agreements between utilities and telecommunications carriers or cable operators.[657] Under any new agreements, to the extent that the incumbent LEC demonstrates that it is obtaining pole attachments on terms and conditions that leave them comparably situated to telecommunications carriers or cable operators, we believe it will be appropriate to use the rate of the comparable attacher as the "just and reasonable" rate for purposes of section 224(b).[658] As discussed above, just and reasonable pole attachments rates for incumbent LECs are not bound by the formulas in sections 224(d) or (e). Where incumbent LECs are attaching to other utilities' poles on terms and conditions that are comparable to those that apply to a telecommunications carrier or a cable operator—which generally will be paying a rate equal or similar to the cable rate under our rules—competitive neutrality counsels in favor of affording incumbent LECs the same rate as the comparable provider (whether the telecommunications carrier or the cable operator).[659] In this regard, an incumbent LEC might demonstrate that it obtains access to poles on terms and conditions that are the same as a telecommunications carrier or cable operator. Even if the terms and conditions of access are not the same, however, incumbent LECs may seek to demonstrate that the arrangement at issue does not provide a material advantage to incumbent LECs relative to cable operators or telecommunications carriers. To facilitate this analysis, we modify our pole attachment complaint rules to require that incumbent LECs provide, in a complaint proceeding, any agreements between the defendant utility and a third party attacher with whom the incumbent LEC claims it is similarly situated (or that the other utility do so if necessary).[660]

218. By contrast, if a new pole attachment agreement between an incumbent LEC and a pole owner includes provisions that materially advantage the incumbent LEC *vis a vis* a telecommunications carrier or cable operator, we believe that a different rate should apply. Just as considerations of competitive neutrality counsel in favor of similar treatment of similarly situated providers, so too should

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between pole owners and either cable operators or telecommunications carriers. *See generally supra* Part IV.E (describing and declining to modify the "sign and sue" rule).

[656] *Cf.* 1977 Senate Report at 20, *reprinted in* 1978 U.S.C.C.A.N. at 129 ("[T]he fairness of any term or condition of a CATV pole-leasing agreement will have to be judged in relation to other contract provisions, prevailing practices in the industries involved, and the particular pole rate charges.").

[657] *See supra* para. 216 and note 654.

[658] This would be somewhat similar to certain proposals that would allow incumbent LECs to "opt in" to pole attachment agreements of telecommunications carriers or cable operators in their entirety. *See Further Notice*, 25 FCC Rcd at 11925, para. 147 (describing proposal). We note that, to the extent that access to poles is a term of these agreements, allowing incumbent LECs to simply "opt in" to such agreements could be at odds with the fact that section 224(f) does not grant incumbent LECs a general right of nondiscriminatory access to poles. Nevertheless, we do not preclude incumbent LECs and other utilities from electing such an approach.

[659] Likewise, an incumbent LEC may seek the same *term* or *condition* that applies to a telecommunications carrier or cable operator upon a showing that it otherwise is comparably situated to that provider.

[660] *See infra* App. A (adopting, as part of new Commission rule 1.1424, the requirement that "In a complaint where an incumbent local exchange carrier or an association of incumbent local exchange carriers claims comparability to the pole attachment agreements of a telecommunications carrier or cable televisions system attacher, and it is not able to file such agreements, the respondent shall have the duty to file such agreements. Confidential information contained in any such filing shall be subject to the terms of an appropriate protective order.").

differently situated providers be treated differently. In particular, we find it reasonable to look to the pre-existing, high-end telecom rate as a reference point in complaint proceedings involving a pole owner and an incumbent LEC attacher that is not similarly situated, or has failed to show that it is similarly situated to a cable or telecommunications attacher.[661] As a higher rate than the regulated rate available to telecommunications carriers and cable operators, it helps account for particular arrangements that provide net advantages to incumbent LECs relative to cable operators or telecommunications carriers. We find it prudent to identify a specific rate to be used as a reference point in these circumstances because it will enable better informed pole attachment negotiations between incumbent LECs and electric utilities. We also believe it will reduce the number of disputes for which Commission resolution is required by providing parties clearer expectations regarding the potential outcomes of formal complaints, thus narrowing the scope of the conflict. For example, we would be skeptical of a complaint by an incumbent LEC seeking a proportionately lower rate to attach to an electric utility's poles than the rate the incumbent LEC is charging the electric utility to attach to its poles.[662] Further, we find it more administrable to look to this rate, which historically has been used in the marketplace, than to attempt to develop in this Order an entirely new rate for this context.

219. We also recognize that incumbent LECs generally are pole owners themselves and, like electric utilities, have agreements governing access to its poles. As appropriate, in evaluating an incumbent LEC's complaint, the Commission may also consider the rates, terms and conditions that the incumbent LEC offers to the electric utility [663] or other attachers for access to the incumbent LEC's poles, including whether they are more or less favorable than the rates, terms and conditions the incumbent LEC is seeking. Further, evidence that a term or condition was contained in the parties' prior joint use agreement will carry significant weight in the Commission's assessment of whether a refusal to agree to a substantially different term or condition regarding the same subject in a new agreement is unreasonable.

220. *Other Fora for Dispute Resolution.* Some electric utilities and other commenters have observed that certain state commissions might provide a forum for resolving incumbent LEC-electric utility pole attachment disputes.[664] We do not preclude parties from electing to pursue complaints before

[661] As discussed above, both the 2007 *Pole Attachment Notice* and the 2010 *Further Notice* sought comment on the appropriate regulated rate for incumbent LECs, including potentially the pre-existing (*i.e.*, high-end) telecom rate. *See supra* paras. 200–201. The 2010 *Further Notice* also sought comment on whether the appropriate remedy for an incumbent LEC should reflect the extent to which it is or is not similarly situated to other attachers with respect to the terms and conditions of access. *Further Notice*, 25 FCC Rcd at 11925–27, paras. 145–48. Comments in response to these notices also cited the pre-existing telecom rate as a possible relevant reference point for evaluating the reasonableness of pole attachment rates paid by incumbent LECs. *See, e.g.*, *Further Notice*, 25 FCC Rcd at 11913–14, para. 119 (describing USTelecom's proposal that the Commission establish a rate approximately equal to the pre-existing urban telecom rate as the just and reasonable rate for incumbent LECs (and other attachers)); Verizon Comments at 3 (comparing the rates it currently pays to both the cable rate and the pre-existing telecom rate); AT&T Comments at 2 (same); Verizon Comments (filed Sept. 24, 2009) at 3 (observing that "because there is no default rate formula for attachments by ILECs" their rate "are generally significantly higher than the rates that nonincumbent carriers and cable television systems pay"); ITTA *NPRM* Comments at 5 (arguing for the Commission to revise its rules to provide that the pre-existing telecom rate is the default rate for incumbent LECs); *see also* United States Telecom Association Petition for Rulemaking, RM-11293 at 17–81 (filed Oct. 11, 2005) (advocating the use of the pre-existing telecom rate formula).

[662] We believe that a just and reasonable rate in such circumstances would be the same proportionate rate charged the electric utility, given the incumbent LEC's relative usage of the pole (such as the same rate per foot of occupied space).

[663] *See, e.g.*, EEI/UTC *NPRM* Comments at 48–49 (expressing concern about electric utilities' inability to file complaints with the Commission to ensure just and reasonable rates, terms and conditions for attachments to incumbent LECs' poles); Alliance Mar. 31, 2011 *Ex Parte* Letter, Attach. at 10 (same).

[664] *See, e.g.*, Comcast Comments at 51–52; Alliance Jan. 27, 2011 *Ex Parte* Letter at 2–3.

state commissions, rather than before the Commission.[665] Section 224 ensures incumbent LECs of appropriate Commission oversight of their pole attachments, however, and we therefore do not require incumbent LECs to pursue relief in state fora before filing a complaint with the Commission.

VI. CLARIFICATION AND RECONSIDERATION OF THE *2010 ORDER*

221. In the *2010 Order*, the Commission clarified that cable operators and telecommunications carriers are entitled to use space- and cost-saving techniques, such as boxing and bracketing, consistent with the individual pole owners' use of those techniques.[666] If a utility chooses to allow boxing and bracketing in some circumstances but not others, the Commission explained, the limiting circumstances must be clear, objective, and applied equally to the utility and attaching entity.[667] The Commission rejected the argument that this conclusion is inconsistent with section 224(f)(2) of the Act, which allows electric utilities to deny access where there is "insufficient capacity."[668] It also sought comment on whether a utility should be allowed to prohibit boxing or bracketing going forward if it has used or allowed them in the past, and on how standards should apply when a pole is jointly used or owned.[669]

222. . On September 2, 2010, various electric utilities and cable providers filed petitions asking the Commission to clarify or reconsider parts of the *2010 Order* concerning the nondiscriminatory use of attachment techniques.[670] On September 16, 2010, the Commission sought comment on these petitions.[671]

223. The Coalition of Concerned Utilities (the Coalition) asks the Commission to clarify that (1) an electric utility's use of boxing, brackets, or any other attachment technique for facilities in the electric space on a pole does not obligate the utility pole owner to allow the same attachment technique to be used for communications attachments; (2) going forward, a pole owner is free to impose new boxing and extension arm requirements regardless of what it may have allowed in the past; and (3) for poles that are jointly owned by an incumbent LEC and an electric utility, each joint owner is permitted to limit the extent to which boxing, bracketing, and other attachment techniques are permitted on the poles.[672] The Coalition argues that a utility's use of boxing, bracketing, and other attachment technique for facilities in

[665] Insofar as electric utilities cite state commissions as a viable forum for dispute resolution, *see, e.g.*, Alliance Jan. 27, 2011 *Ex Parte* Letter at 2–3, it appears that they likewise could avail themselves of such a forum if faced with unjust or unreasonable rates, terms and conditions for access to incumbent LECs' poles.

[666] *2010 Order*, 25 FCC Rcd at 11869, para. 9.

[667] *Id.* at 11871, para. 13.

[668] *Id.* at 11871–72, para. 14.

[669] *Id.* at 11896–97, para. 74.

[670] While one filing is styled as a "petition for reconsideration" and the other three are styled as "petitions for clarification or reconsideration," we treat each as a petition for reconsideration filed under section 1.429 of our rules. *See* Coalition of Concerned Utilities, Petition for Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51 (filed Sep. 2, 2010) (Coalition Petition); Florida Investor-Owned Electric Utilities, Petition for Reconsideration and Request for Clarification, GN Docket No. 09-51 (filed Sep. 2, 2009) (Florida IOU Petition); Oncor Electric Delivery Company LLC, Petition for Reconsideration and Request for Clarification, WC Docket No. 07-245; GN Docket No. 09-51 (filed Sep. 2, 2010); Alabama Cable Telecommunications Ass'n, Bresnan Communications, Broadband Cable Ass'n of Pennsylvania, Cable America Corp., Cable Television Ass'n of Georgia, Florida Cable Telecommunications, Inc., MediaCom Communications Corp., New England Cable and Telecommunications Ass'n, Ohio Cable Telecommunications Ass'n, Oregon Cable Telecommunications Ass'n, and South Carolina Cable Television Ass'n, Petition for Reconsideration or Clarification, WC Docket No. 07-245, GN Docket No. 09-51 (filed Sep. 2, 2010) (Cable Providers Petition); *see also 2010 Order*, 25 FCC Rcd at 11869–73, paras. 8–16.

[671] *Comments Sought on Petitions for Reconsideration of Pole Attachments Order*, WC Docket No. 07-245, GN Docket No. 09-51, Public Notice, 25 FCC Rcd 13173 (WCB 2010).

[672] Coalition Petition at 2–3.

the electric space does not obligate it to allow the same attachment technique to be used for communications attachments.[673] It also asserts that utilities should be able to modify their policies with respect to attachment techniques provided the new policy is applied in a nondiscriminatory manner going forward, and that each owner should be permitted to establish requirements or limitations on attachment techniques on jointly owned poles.[674]

224. The Florida Investor-Owned Electric Utilities (Florida IOUs) ask the Commission to clarify that (1) an electric utility's duty to allow boxing, bracketing, and similar techniques is not affected by (a) electric supply construction configurations within the supply space, or (b) the use of boxing, bracketing, and other similar techniques for purposes other than "space and cost-saving"; and (2) the statute only requires accommodation of a new attachment via rearrangement or space-saving techniques within the communications space, and does not require rearrangement or use of space-saving techniques for electric facilities in the supply space.[675] The Florida IOUs maintain that "comparable" circumstances should be limited to where the utility uses a practice for its own facility in the communications space or has permitted other attachers to use the technique as a means of cost- and space-saving.[676] They also argue that requiring a utility to perform make-ready in the electric space would misconstrue the scope of the "insufficient capacity" exception, conflate the separate exceptions to nondiscriminatory access by defining "insufficient capacity" contrary to the legislative intent of section 224, and conflict with the Commission's earlier findings.

225. Oncor Electric Delivery Company LLC (Oncor) joins and adopts the arguments set forth in both the Coalition's petition and the Florida IOUs' petition.[677] Oncor also argues that the Commission lacks authority to adopt any of the rules set forth in the *2010 Order*.[678]

226. The Alabama Cable Telecommunications Association, Bresnan Communications, Broadband Cable Association of Pennsylvania, Cable America Corp., Cable Television Association of Georgia, Florida Cable Telecommunications, Inc., MediaCom Communications Corp., New England Cable and Telecommunications Association, Ohio Cable Telecommunications Association, Oregon Cable Telecommunications Association, and South Carolina Cable Television Association (the Cable Providers) ask the Commission to clarify that pole owners may not refuse to replace or change out an existing pole with a taller replacement pole where a taller pole is needed to accommodate existing or prospective attachers.[679] Because this issue is beyond the scope of the *2010 Order*, we dismiss the Cable Providers' request as an improperly filed petition for reconsideration.[680] While the *2010 Order* may have alluded to pole replacement in discussing our findings on attachment techniques, the Commission made no findings in that Order relative to pole replacement.[681] Thus, the *2010 Order* provides no basis upon which to reconsider (or clarify) a utility's obligation to perform pole change-outs, and there is no record foundation for making the clarification sought by the Cable Providers.

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[673] *Id.* at 3–4.

[674] *Id.* at 4–5.

[675] Florida IOUs Petition at 2–3.

[676] *Id.* at 4–11.

[677] Oncor Petition at 1.

[678] *Id.*

[679] Cable Providers Petition at 2.

[680] *See* 47 C.F.R. § 1.429; *2010 Order*, 25 FCC Rcd at 11869–73, paras. 8–16.

[681] *See 2010 Order*, 25 FCC Rcd at 11869–73, paras. 8–16.

A. Prospective Policies

227. We clarify that a utility may not simply prohibit an attacher from using boxing, bracketing, or any other attachment technique on a going forward basis where the utility, at the time of an attacher's request, employs such techniques itself.[682] As Fibertech points out, even a policy that is equally applied prospectively is discriminatory in the sense that it disadvantages new attachers.[683] Thus, the relevant standards for purposes of determining a utility's "existing practices" are those that a utility applies at the time of an attacher's request to use a particular attachment technique—not the standards that a utility wishes to apply going forward. A utility may, however, choose to reduce or eliminate altogether the use of a particular method of attachment used on its poles, including boxing or bracketing, which would alter the range of circumstances in which it is obligated to allow future attachers to use the same techniques.

B. Joint Ownership

228. We also clarify that, where a pole is jointly owned and the owners have adopted different standards regarding the use of boxing, bracketing, or other attachment techniques, the joint owners may apply the more restrictive standards.[684] For instance, if an electric utility and an incumbent LEC jointly own a pole but have divergent standards regarding the use of boxing, they may refuse to allow an attacher to box in a situation where boxing would be allowed by one utility's standards but not the other's. We disagree with Fibertech that permitting application of the more restrictive standard will allow joint pole owners to "double team" attachers by demanding compliance with one set of standards initially and then a different set later.[685] In order to avoid a claim that their terms and conditions for access are unjust, unreasonable or discriminatory, joint pole owners should settle on and apply a single set of standards—not different sets at different times.[686]

C. Similar Circumstances and the Electric Space

229. At the Coalition's request, we clarify that an electric utility's use of a particular attachment technique for facilities in the electric space does not obligate the utility to allow the same technique to be used by attachers in the communications space.[687] We likewise clarify, in response to the Florida IOUs' request, that the existence of boxing and bracketing configurations in the electric space do not trigger an attacher's right to use boxing and bracketing in the communications space.[688] The *2010 Order* specified that attachers are entitled to use the same techniques that the utility itself uses in similar circumstances,[689] and we agree with the petitioners that the above situations do not involve similar circumstances.[690] For instance, boxing and bracketing in the communications space can limit the use of climbing as a means of maintenance and repair, and also complicate pole change out.[691]

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[682] *See id.* at 11896–97, para. 74; Coalition Petition at 2–3.

[683] Fibertech Coalition Petition Comments at 9–10.

[684] *See 2010 Order*, 25 FCC Rcd at 11896–97, para. 74

[685] Fibertech Comments in re Coalition Petition at 11–12.

[686] *See supra* Part III.D.

[687] Coalition Petition at 3.

[688] Florida IOUs Petition at 2.

[689] *See 2010 Order*, 25 FCC Rcd at 11869, para. 9.

[690] *See* Coalition Petition at 3–4; Florida IOUs Petition at 7–8.

[691] *See* Coalition Petition at 3–4; Florida IOUs Petition at 7–8.

230. We disagree with the petitioners, however, that the nondiscrimination requirement in section 224(f)(1) applies only to the extent that a pole owner has allowed itself or others to use an attachment technique in the communications space of a pole.[692] As explained in further detail below, the Act does not limit a utility's nondiscrimination obligations to activities that take place in the communications space.[693] Thus, while an electric utility's use of an attachment technique in the electric space might not obligate it to permit use of such technique in the communications space, its use of an attachment technique (like boxing and bracketing) in the electric space may, in fact, obligate it to allow use of that technique in the electric space. The salient issue is whether the attacher's use of a particular technique is consistent with the utility's, not whether its use is consistent with the utility's in the communication space.

D. Insufficient Capacity and the Electric Space

231. We deny the Florida IOUs' request to find that a pole has "insufficient capacity" if an electric utility must rearrange its electric facilities to accommodate a new attacher.[694] As explained in the *2010 Order*, a pole does not have insufficient capacity where a request for attachment could be accommodated using traditional methods of attachment.[695] Rearrangement of facilities on a pole is one of these methods,[696] and nothing in the statute suggests that, for purposes of gauging capacity, rearrangement of facilities in the electric space should be treated differently from rearrangement of facilities in the communications space.[697] Thus, where rearrangement of a pole's facilities—whether in the communications space or the electric space—can accommodate an attachment, there is not "insufficient capacity" under section 224(f)(2).

232. Contrary to the Florida IOUs' assertions, this holding does not "repeat[]—almost verbatim—the error found by the Eleventh Circuit in *Southern*."[698] In *Southern Co.*, the Eleventh Circuit found that the Commission had failed to give effect to the term "insufficient capacity" by requiring utilities to expand capacity to accommodate requests for attachment.[699] Specifically, "[w]hen it is agreed that capacity is insufficient," the court explained, "there is no obligation to provide third parties with access to that particular 'pole, duct, conduit, or right-of-way.'"[700] Here, however, we recognize that a utility may deny access where a pole's capacity is insufficient to accommodate a proposed attachment, but find that capacity is not insufficient where a request can be accommodated using traditional methods of attachment.[701] We do not equate capacity expansion with facility rearrangement in existing space.

233. The Florida IOUs' other argument, that this holding improperly conflates the separate exceptions to nondiscriminatory access, is also unpersuasive. According to the Florida IOUs, the Commission is combining the "insufficient capacity" exception with the "safety, reliability, and generally applicable engineering purposes" exceptions, even though the statute sets them out separately.[702] We

[692] *See* Coalition Petition at 2; Florida IOUs Petition at 9.

[693] *See infra* para. 231.

[694] *See* Florida IOUs Petition at 13.

[695] *2010 Order*, 25 FCC Rcd at 11871–73, paras. 14–16.

[696] *See id.*

[697] *See* 47 U.S.C. § 224; *see also* Florida IOUs Petition Comments at 5–6.

[698] Florida IOUs Petition at 18.

[699] *Southern*, 293 F.3d at 1346.

[700] *Id.* at 1347.

[701] *2010 Order*, 25 FCC Rcd at 11871–73, paras. 14–16.

[702] Florida IOUs Petition at 18.

disagree. Under the Commission's reading, there are situations where the insufficient capacity exception—and only the insufficient capacity exception—allows a utility to deny a request for access.[703]

234. Additionally, we disagree with the Florida IOUs that the Commission's construction of "insufficient capacity" contradicts prior Commission interpretations of the phrase.[704] As the *2010 Order* explains, "the term 'capacity expansion' does not appear in the relevant provisions of the Act or our rules, so the Commission has discretion to reasonably construe that term in interpreting section 224(f)(2)."[705] The relevant issue in determining whether a pole has "insufficient capacity," is whether a utility could accommodate a new attachment on a pole by using techniques that the utility employs in its own operations.[706] To the extent the Commission's prior statements concerning "capacity expansion" can be read as inconsistent with this finding,[707] we have disavowed those statements and clarify that capacity is not "insufficient" for purposes of section 224(f)(2) where a utility can accommodate new facilities on a pole by using attachment methods that the utility itself employs.[708]

E. Space- and Cost-Saving

235. The Florida IOUs argue that section 224(f)(2) allows an electric utility to deny use of a particular attachment technique when the utility itself has not used or authorized that technique as a means of saving both space and cost.[709] We disagree that 224(f)(2) is so limited. We find that the Florida IOUs' restrictive interpretation has no basis in the text of section 224 and would enable a utility to refuse an attacher use of a particular attachment technique in situations where the utility itself uses the technique or authorizes its use by third parties. If a utility uses bracketing as a means of saving cost (but not space) in a particular type of situation, for instance, it must allow attachers also to use bracketing. But under the Florida IOUs' formulation, the utility would have no duty to do so.

236. We reiterate, however, that to the extent a utility uses or allows a certain attachment technique in one type of circumstance, it is not obligated to allow the same technique in any type of circumstance. As the Commission explained in the *2010 Order*, a utility may limit the circumstances in which a particular technique can be used so long as its standards are "clear, objective, and applied equally to both the utility and the attaching entity."[710] Thus, the Florida IOUs' professed concern, that allowing a technique like bracketing in "rare situations" will "open-up poles to widespread use [of it]," is unfounded.[711]

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[703] *See, e.g., 2010 Order*, 25 FCC Rcd at 11871–73, paras. 14-16; *Southern*, 293 F.3d at 1346–47.

[704] Florida IOUs Petition at 20.

[705] *2010 Order*, 25 FCC Rcd at 11872, n.56.

[706] *Id.*

[707] Although some of the Commission's past statements might suggest that a pole's capacity "increases" or "expands" when facilities are rearranged, others suggest the opposite. *Compare, e.g., Local Competition Order*, 11 FCC Rcd at 16075, para. 1161 (suggesting that rearranging existing facilities "maximize[es] usable capacity") *with Local Competition Order*, 11 FCC Rcd at 16076, para. 1163 (suggesting that rearranging existing facilities "increases capacity").

[708] *Id.* Generally, an agency may depart from a prior decision if it acknowledges that it is doing so and provides a reasonable explanation for the change. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). While the *2010 Order* referred to statements in the *Local Competition Order* when referring to disavowal, we now clarify that this extends also to statements in the *Local Competition Order on Reconsideration.*

[709] *See* Florida IOUs Petition at 3, 9–10.

[710] *See 2010 Order*, 25 FCC Rcd at 11870, para. 11.

[711] Florida IOUs Petition at 10, n. 25.

VII. PROCEDURAL MATTERS

A. Paperwork Reduction Act Analysis

237. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements adopted in this Order.

B. Regulatory Flexibility Analysis

238. As required by the Regulatory Flexibility Act (RFA),[712] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Pole Attachment Order and Further Notice*.[713] The Commission sought written public comment on the possible significant economic impact on small entities regarding the proposals addressed in the *Pole Attachment Order and Further Notice*, including comments on the IRFA. Pursuant to the RFA, a Final Regulatory Flexibility Analysis (FRFA) is set forth in Appendix B.

C. Congressional Review Act

239. The Commission will send a copy of the Report and Order and Order on Reconsideration, including the FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[714]

D. Accessible Formats

240. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CARTS, *etc.*) by e-mail: FCC504@fcc.gov; phone: (202) 418-0530 (voice), (202) 418-0432 (TTY).

VIII. ORDERING CLAUSES

241. Accordingly, IT IS ORDERED that pursuant to sections 1, 4(i), 4(j), 224, 251(b)(4), and 303 , of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 224, 251(b)(4), 303(r), 1302, this Report and Order and Order on Reconsideration IS ADOPTED.

242. IT IS FURTHER ORDERED that Part 1 of the Commission's rules IS AMENDED as set forth in Appendix A.

243. IT IS FURTHER ORDERED that, pursuant to sections 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 CFR §§ 1.4(b)(1), 1.103(a), this Report and Order and Order on Reconsideration SHALL BE EFFECTIVE 30 days after publication of a summary in the Federal Register, except for the information collection requirements contained in the Report and Order, which will become effective upon OMB approval.

244. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order and Order on

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[712] *See* 5 U.S.C. § 603.

[713] *See Further Notice*, 25 FCC Rcd at 11939–57 (App. D).

[714] *See* 5 U.S.C. § 801(a)(1)(A).

Reconsideration, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

245. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 224, that the Petition for Reconsideration and Request for Clarification filed by the Florida Investor-Owned Utilities is GRANTED to the extent indicated herein, and otherwise is DENIED.

246. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 224, that the Petition for Reconsideration filed by the Coalition of Concerned Utilities is GRANTED to the extent indicated herein, and otherwise is DENIED.

247. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 224, that the Petition for Reconsideration and Request for Clarification filed by the Oncor Electric Delivery Company is GRANTED to the extent indicated herein, and otherwise is DENIED.

248. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 224 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 224, that the Petition for Reconsideration or Clarification filed by the Cable Providers is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary